

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY LEE FARR, JR.,

Defendant-Appellant.

---

UNPUBLISHED

August 17, 2006

No. 260481

Macomb Circuit Court

LC No. 2004-001183-FC

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and sentenced to concurrent prison terms of 24 to 60 years for each conviction. He appeals as of right, and we affirm.

Defendant first argues that he was denied the effective assistance of counsel. The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant was charged with first-degree CSC under MCL 750.520b(1)(f), which required the prosecutor to prove that defendant engaged in sexual penetration by force or coercion and caused personal injury. The jury was also instructed on the lesser offense of third-degree CSC, which does not require personal injury. MCL 750.520d. Defendant argues that defense counsel's remarks in closing argument amounted to an improper concession of defendant's guilt without his consent, and that counsel was also ineffective for failing to present a defense. We disagree.

Defendant correctly observes that defense counsel conceded in his closing argument that defendant caused at least some of the victim's injuries. Nevertheless, we find no ineffective assistance of counsel. Defendant was faced with indisputable evidence of the victim's injuries,

most of which were external. Although defense counsel conceded that defendant caused some of the victim's injuries, he contended that the victim suffered these injuries in a separate domestic dispute, and that the sex was consensual, as it had been in the past. Considering the evidence of the victim's injuries, we conclude that this was reasonable trial strategy. Placing the injuries in this context enforced defendant's contention that he and the victim had a boyfriend-girlfriend relationship, which made the defense of consent more plausible. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Further, assuming that defense counsel's remarks can be construed as conceding the personal injury element for purposes of first-degree CSC statute, a lawyer does not render ineffective assistance by conceding certain points at trial. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Conceding an element of the offense does not equate to a concession of guilt on the charged offense. It is clear from defense counsel's questions and remarks at trial that a defense of consent was presented. Defense counsel repeatedly asserted in his closing argument that the element of force was not proven. Because defense counsel argued that there was no evidence of force, which was necessary to prove first- or third-degree CSC, he did not concede defendant's guilt to any charged or instructed offense.

Defendant next argues that there was insufficient evidence that the victim suffered a personal injury within the meaning of the first-degree CSC statute to support his convictions of first-degree CSC. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

A person is guilty of first-degree CSC if he engages in forced or coerced sexual penetration with another person and causes personal injury to the victim. MCL 750.520(b)(1)(f). "'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l). Defendant argues that the evidence was insufficient to show that the victim suffered a bodily injury or mental anguish as defined in the statute. We disagree.

An injury need not be permanent or substantial to satisfy the personal injury element. *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). Bruising caused by the forceful application of a hand is sufficient to satisfy the element of personal injury. *People v Hollis*, 96 Mich App 333, 337; 292 NW2d 538 (1980).

Here, the victim testified that defendant choked her, leaving a red mark on her neck. The evidence also indicated that the victim had a large bruise on her right inner thigh, two bleeding contusions on her vaginal cuff, and dozens of scratches and cuts to her face and body. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that the victim's injuries were sufficient to satisfy the personal injury element. See also *People v Gwinn*, 111 Mich App 223, 239; 314 NW2d 562 (1981). Therefore, we need not address whether the victim also suffered mental anguish. Bodily

injury and mental anguish are different aspects of the single element of personal injury and only one need be proven. *People v Asevedo*, 217 Mich App 393, 481; 551 NW2d 478 (1996).

Defendant next argues that the trial court erred in scoring offense variable 7 (OV 7) of the sentencing guidelines at 50 points. A sentencing court has discretion in determining the number of points to be scored and its scoring decision will be upheld on appeal if there is any evidence on the record to support it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

OV 7 addresses aggravated physical abuse. Fifty points are to be scored when “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a).

Defendant argues that the scoring of OV 7 was improper because there was no evidence that his conduct was designed to increase the victim’s fear or anxiety level beyond that which would normally occur during the commission of a sexual assault. However, the victim testified that defendant choked her, told her he would punish her for throwing a lamp at him, and then sat on her back forcing the air out of her lungs. He also told her he would slit her throat if she bit his penis during oral sex, and told her she would be punished for trying to escape. The victim also testified that she became more terrified with each of defendant’s actions and statements. There was sufficient evidence to support the trial court’s score of 50 points for OV 7 on the basis that defendant’s actions and statements were not necessary to accomplish the offense and were designed to substantially increase the victim’s fear in order to make her more compliant.

Lastly, defendant argues in his standard 4 brief that counsel was ineffective for failing to object to testimony regarding long blond hairs that were found under defendant’s scrotum. The testimony established that these hairs did not come from defendant’s body. Defendant asserts that the victim did not have blond hair, and that defense counsel and the prosecutor were aware of this. He argues that defense counsel should have objection to admission as irrelevant and prejudicial. Assuming that defendant’s allegations are correct, we are satisfied that the admission of the evidence did not affect the verdict. The jury would have been able to determine the color of the victim’s hair and the relevance of the evidence.

Defendant also asserts that defense counsel was ineffective for failing to present a defense and failing to call certain witnesses, and additionally contends that he did not receive discovery materials. However, defense counsel did, in fact, present the defense of consent. Further, we are satisfied that the testimony referenced in defendant’s *pro se* brief would not have impacted the trial. Finally, defendant has not shown that relevant evidence was withheld.

Affirmed.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Helene N. White